Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-92-30

FACTS:

You are an elected City Councillor. The City Council will soon be voting to fill a vacancy in the office of City Clerk. You wish to be a candidate for this position.

QUESTION:

What limitations does G.L. c. 268A establish for you?

ANSWER:

1. The City Council may not elect you as City Clerk until thirty days after you cease to be a Councillor.

2. While you remain a Councillor, you may not participate, even informally, in matters related to your City Clerk candidacy.

DISCUSSION:

As a Councillor, you are a "municipal employee" under the state conflict of interest law. G.L. c. 268A, §1(g). Your request raises issues under the following sections of the conflict of interest law.

1. Section 21A

Section 21A of G.L. c. 268A provides in relevant part:

> [N]o member of a municipal commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission
> or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.

Since you wish to seek election by the City Council's members as City Clerk, whether §21A applies will depend on (a) whether the City Council is a "municipal commission or board" and (b) whether the City Clerk is "under the [Council's] supervision."

(a)The City Council is a "municipal commission or board."

The term "municipal commission or board" is not explicitly defined in G.L. c. 268A or elsewhere in the General Laws. We therefore look to "the common and approved usage of the language." G.L. c. 4, §6 (Third). *See McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992).

Relevant definitions in Webster's Ninth New Collegiate Dictionary (1987) indicate that a "commission" is "a government agency having administrative, legislative, or judicial powers," and similarly that a "board" is "a group of persons having managerial, supervisory, investigatory, or advisory powers." Certainly, a City Council, the municipal legislative body, easily fits within these terms.

Other provisions of the General Laws refer to a city council as a "board." G.L. c. 4, §7 (First); c. 39, §1.

Indeed, some Massachusetts cities use the term "board of aldermen" to refer to their city councils, and the statutes just cited treat the two terms as interchangeable. *See also* G.L. c. 50, §1 (defining "aldermen"). In other contexts, we have held that the substance of an arrangement, rather than its name, is controlling, considering the broad remedial purposes of G.L. c. 268A. *See EC-COI-89-5; 83-81; 82-68; 80-43* (substance of relationship determines whether partnership exists).

In an analogous situation, the Supreme Judicial Court recently considered whether the state open meeting law, G.L. c. 30A, §11A, applies to the state executive Council as a "Governmental body." *Pineo v. Executive Council*, 412 Mass. 31, 34-37 (1992). The statute defined that term as "a state board, committee, special committee, subcommittee or commission, however created or constituted within the executive . . . branch of the commonwealth . . . ." The court first applied this statutory definition to the Council as an executive "board," citing *Scullin v. Cities Service Oil Co.*, 304 Mass. 75, 78-79 (1939). But the court then held that this application violated the constitutional separation of powers, because the Legislature had no power to regulate the Council's procedures. Here, where no such constitutional issue arises, the *Pineo* court's analysis suggests that the term "board" unambiguously applies to this "Council," since the court presumably would have resolved any ambiguity in favor of the statute's constitutionality, according to the usual rule of statutory construction. *See Weld for Governor v. Director of the Office of Campaign and Political Finance*, 407 Mass. 761, 769 (1990).

Finally, applying §21A to every multi-member municipal body is consistent with the statute's history and purpose.[1/] *See McMann*, 32 Mass. App. Ct. at 427 (G.L. c. 268A should be read to effectuate fully its comprehensive purpose "to strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain"). Section 21A — and its state and county counterparts, §§8A and 15A — have their roots in the common law doctrine of incompatibility of offices. In *Gaw v. Ashley*, 195 Mass. 173 (1907), the Supreme Judicial Court first applied this doctrine to hold that a municipal board could not appoint its own member to a position under the board's supervision. While the court seemed chiefly concerned that the appointee would continue to sit on the board, and thus that his present colleagues would be supervising his performance, the court phrased the prohibition more generally, as prohibiting the appointment itself. Soon after the court again applied this prohibition, in *Attorney General v. Henry*, 262 Mass. 127, 132 (1928), the Legislature enacted a narrow exception, allowing the town meeting to approve an otherwise prohibited appointment.[2/] St. 1929, c. 36, enacting G.L. c. 41, §4A. In *Mastrangelo v. Board of Health of Watertown*, 340 Mass. 491, 492 (1960), the court later held that this statute otherwise codified the common-law rule, and squarely rejected an argument (based on the reasoning of *Gaw* and its progeny) that the basic prohibition so codified should not apply if the member appointed resigned from the board immediately afterward.

Finally, in *Starr v. Board of Health of Clinton*, 356 Mass. 426, 428-29 (1969), the court again applied G.L. c. 41, §4A to prohibit a municipal board from appointing its own present member to a position under the board's supervision. The court noted the Legislature's enactment, subsequent to the events at issue there, of G.L. c. 268A, §21A (by St. 1967, c. 887, §2).[3/] The court commented: "The legislative purpose behind the enactment of [§21A] seems to confirm the purpose which was contained in G.L. c. 41, §4A." 356 Mass. at 429 n.2.

The point of this history is that nothing in the rationale of the original common-law rule suggests limiting its application to any particular multi-member government bodies, however named or constituted. Since the Supreme Judicial Court has said that G.L. c. 41, §4A intended to codify this rule (with an exception irrelevant here), and that G.L. c. 268A, §21A sought to "confirm" that earlier statute, it follows that §21A should be read to apply to all multi-member municipal bodies. As explained above, this result also "take[s] into account the ordinary and approved usage of the statutory language . . . and the purpose of the [conflict] law . . . ." *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). We therefore conclude that a City Council is a "municipal commission or board" for the purpose of §21A.

(b)The City Clerk is "under the [Council's] supervision."

The city charter provides that the City Clerk shall be the clerk of the City Council. The Clerk is to give notice of all meetings of the City Council to its members and to the public, keep the journal of its proceedings, and perform such other duties as may be assigned by the charter, by ordinance or by other vote of the City Council. Furthermore, the City Clerk, as an "officer appointed or elected by the city council[,] may be removed by said council for cause . . . ." G.L. c. 39, §8A.

This relationship between the Council and the Clerk is the same as that described in the cases, including *Gaw, Henry, Mastrangelo*, and *Starr*, that prefigured §21A; it includes detailed direction and oversight of activities, amounting to an agency relationship, and (at least here) the power to discharge. We conclude that the City Clerk is "under the supervision of" the City Council for the purpose of §21A.

Therefore, you will not be eligible for election by the Council as City Clerk for as long as you remain a Councillor and for thirty days thereafter. No vote to elect you is valid unless it occurs more than thirty days after your service as a Councillor ends.

2. Sections 19 and 23(b)(2)

Even if you eventually resign from the Council in order to seek election as City Clerk more than thirty days later, other relevant provisions of G.L. c. 268A will apply to you for as long as you do remain a Councillor. Section 19 prohibits a municipal employee from participating in any particular matter in which he (among others) has a financial interest. Section 23(b)(2) prohibits a public employee from using his official position to obtain unwarranted privileges of substantial value for himself.

Together, these provisions prohibit you from participating, even informally, in matters related to your City Clerk candidacy. For example, if the Council were considering a statement of qualifications, notice, advertisement, or procedural rules for the City Clerk's position, you could not participate at all. Note that participation includes not only voting but discussion, including informal lobbying of other Councilors. *See* G.L. c. 268A, §1(j). When any such matter comes before the Council, therefore, in the words of the Supreme Judicial Court, "Ordinarily, the wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

Finally, these provisions prevent you from using your present position as Councillor to obtain other Councillors' later favorable consideration of your City Clerk candidacy. *See Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983) (state legislator violated G.L. c. 268A, §§6, 23 by pressuring a state agency to award grant that would benefit him and his brothers).

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[1/]We disavow any contrary suggestion in *EC-COI-83-84* n.3 or *EC-COI-82-156* n.4. *See* note 3 *infra*.

[2/]For cities, the prohibition is codified in G.L. c. 39, §8, which provides in relevant part: "No member of the city council shall, during the term for which he was chosen, either by appointment or by election of the city council . . . , be eligible to any office the salary of which is payable by the city." Whether this statute applies to your situation is beyond our jurisdiction. *See* G.L. c. 268B, §3(g). Even if it does independently prohibit your candidacy for City Clerk while you are a Councillor, *Rugg v. Town Clerk of Arlington*, 364 Mass. 264, 268 (1973) suggests that it would allow your election as City Clerk immediately after your resignation as a Councillor. Thus, we would still need to decide whether the thirty-day waiting period of §21A applies to you as well. (For similar reasons, we need not discuss the application of G.L. c. 268A, §20 to this situation.)

[3/]The state counterpart of §21A had been enacted earlier by St. 1964, c. 314. We have carefully examined the legislative history of both the 1964 and 1967 statutes, and find nothing in either to support any different result. Indeed, what emerges is legislative faithfulness to the rule's previous terms. Thus, the Legislature considering the 1964 bill (S. 466) first accepted a committee report reducing the proposed new waiting period from two years to thirty days, 1964 Sen. J. 790 (Apr. 2), and then rejected a Senate amendment limiting the rule's application to salaried positions. *Compare id*. at 820 (Apr. 6) *with* 1964 House J. 1446 (Apr. 8). The only substantive legislative change made in the 1967 bill extending the 1964 state prohibition to county and municipal boards (H. 654) was to incorporate from G.L. c. 41, §4A the exception for town meeting approval. 1967 Sen. J. 2418-19 (Dec. 12).